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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EARL MASON, Defendant and Appellant.	B283892 Los Angeles County Super. Ct. No. VA141042

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Reversed in part and remanded with directions.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Earl Mason of one count of shooting at an occupied vehicle, two counts of attempted voluntary manslaughter, and two counts of possession of a firearm and ammunition by a felon, finding true firearm and gang enhancements. The trial court found Mason had two prior strike convictions, two prior serious felony convictions, and three prior prison terms. The court sentenced Mason to 100 years to life in state prison.

Mason's appeal challenges the sufficiency of the evidence on the voluntary manslaughter counts and the true findings on the gang enhancements. He contends the trial court erred in instructing the jury and at sentencing. Finally, he argues we must remand for the trial court to exercise its discretion whether to strike the firearm and serious felony enhancements. We reverse in part and remand.

BACKGROUND

An information alleged that on January 18, 2016, Mason shot at an occupied motor vehicle (Pen. Code, § 246,[1] count 1), committed two attempted willful, deliberate, and premeditated murders of John Doe and Jane Doe (§§ 664, 187, subd. (a), counts 2 & 3), and possessed a firearm and ammunition as a felon (§§ 29800, subd. (a)(1), 30305, subd. (a)(1), counts 4 & 5). The attempted murder counts alleged enhancements for personal use and discharge of a firearm and violent felony gang enhancements, the shooting at an occupied vehicle and the attempted murder counts alleged serious-felony gang enhancements, and the felon in possession of a firearm and ammunition counts alleged felony gang enhancements. The

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[1] All subsequent statutory references are to the Penal Code.

information alleged four prior prison terms, two prior serious felony convictions, and two prior serious or violent felony convictions. During jury selection, Mason stipulated that he was a convicted felon for purposes of the felon in possession counts.

At trial, Deputy Sheriff Jay Brown testified that at 9:30 p.m. on January 18, 2016, he and his partner Deputy Tim Gannon were parked near the GI Liquor Mart at 94th Street and Alameda in an unincorporated area of Los Angeles County near Watts, waiting on another call. A blue Lincoln Town Car sped by with the motor revving and screeching tires, and Deputy Brown followed.

The Town Car stopped in front of the liquor store and Mason burst out of the driver's side, pointing a gray metal gun directly at a white Honda Civic and firing off a round. Mason dropped his arm, walked around to the front of the Town Car, raised his arm again, and fired two or three more rounds toward the white Civic as it drove away. Deputy Brown could not see the occupants of the Civic, but learned from video surveillance that a man was driving with a woman as a passenger.

Mason turned around casually, and then startled when he saw the deputies. Mason ran away from the Town Car and handed the gun to a Grape Street gang member nicknamed WiFi, who was standing on the sidewalk in front of the liquor store. WiFi tucked the gun into his midriff and ran north on Alameda. At the deputies' direction, Mason walked back toward the rear of the Town Car, saying, " 'I don't have nothing. I didn't do shit.' " He took off his jacket, dropped it onto the ground, and began to run, following WiFi. Deputy Brown made sure no one else was in the Town Car, and then he and Deputy Gannon ran after Mason, radioing for assistance.

Mason ran past WiFi and headed in a different direction. Detective Brown pursued WiFi and caught and detained him, but he no longer had the gun. A detective found the gun a block behind where WiFi was detained, empty of ammunition. Another unit detained Mason in an alley off 95th.

Deputy Brown recovered an expended bullet and a cartridge from the middle of 94th. Although the deputies tried to locate the white Civic, checked hospitals, and contacted agencies to see if anyone reported gunshots, they found nothing, and never identified the man (John Doe) and the woman (Jane Doe) who were in the car when Mason shot at it.

Deputy Gannon testified that he could see that two people were in the Civic, and he saw Mason point the gun and fire two to four shots at the car. Mason stopped, perhaps because he ran out of bullets, and after he turned around and saw the deputies, handed the gun to WiFi. Although they found only one bullet at the scene, Deputy Gannon was absolutely sure he heard more than one shot.

Detective Daniel Machuca testified as a gang expert. Mason was a self-admitted member of the Grape Street Crips and had gang tattoos. Grape Street was the largest Crips gang in Watts, and the liquor store was in the gang's territory. Detective Machuca testified that Grape Street members had been convicted of two felonies, felon in possession of a firearm in 2015 and burglary in 2014. The violent incident at the liquor store would benefit Grape Street's reputation and increase fear in the community, and would enhance Mason's reputation as a violent or dangerous man. Mason would be seen "as a gang member who is not afraid to put in work," which meant "engaging in criminal activity such as robberies, burglaries, shootings, stabbings, and

so forth and selling narcotics." Although Detective Machuca did not know whether John Doe and Jane Doe were gang members, this type of activity would benefit Grape Street by making people in the community reluctant to report gang violence.

Detective Machuca described the surveillance video as it was played for the jury. The video showed Mason inside the liquor store with Jane Doe and a man in a checked jacket in Grape Street colors. Mason and the man in the checked jacket greeted each other with a hug. The two men then engaged in a conversation with Jane Doe (described by defense counsel as "a confrontation") as she bought items at the counter, and she left the store.

Outside, John Doe was standing next to the white Civic. Mason and John Doe began a series of fistfights, with Mason taking off his jacket to square off. The man in the checked jacket got between Mason and John Doe as they continued to throw punches. Jane Doe was in the watching crowd and, at one point, held John Doe.

Mason got into a car that drove away. The man in the checked jacket talked to John Doe next to the Civic, with Jane Doe in front of the car. WiFi walked into the picture. John Doe got into the driver's seat, and after Jane Doe got into the passenger seat, they backed out of the parking lot and stopped on the south side of the street. The man in the checked jacket crouched down to talk through the passenger window of the Civic, which stayed by the curb. When Mason drove up in the Town Car, the Civic took off, and Mason got out of the Town Car and started firing at the Civic. The video showed Mason fire one shot, take some steps, and extend his arm to fire again at the Civic.

Mason then trotted back to the Town Car, passed the firearm to WiFi, took his jacket off and dropped it, and fled.

Gunshot residue was found on Mason's hands, consistent with the discharge of a firearm. The cartridge and bullet found at the scene had been fired from the gun WiFi discarded as he ran. Mason's fingerprints were on the driver's side window and visor of the Town Car.

In closing argument, the prosecutor argued that Mason had a "beef" with John Doe and clearly intended to kill him. Mason also had the concurrent intent to kill Jane Doe because the nature and scope of the attack made it reasonable for the jury to infer that he intended to kill the others in the vicinity. Defense counsel stated: "[I]f you want to kill somebody and you fire one time or more than one time with the intent to kill, the specific intent to kill you have to aim the gun at the purported victims," but did not address whether Mason had the concurrent intent to kill Jane Doe. Counsel argued the video showed an "altercation" between Mason and Jane Doe in the liquor store, which led to another fight outside. When Mason "overreacted" and returned and shot the gun, he acted in a heat of passion and had not cooled down. In rebuttal, the prosecutor argued that an "abundance" of evidence showed that Mason premeditated, and when he pointed the gun at the car windows, he intended to kill John Doe and Jane Doe.

The jury convicted Mason on all counts and found the gang and firearm allegations true. The trial court sentenced Mason to 100 years to life in prison, staying the sentences on counts 1 and 5 under section 654.

DISCUSSION

1. *Sufficient evidence supported the attempted voluntary manslaughter convictions*

Mason argues that insufficient evidence supported the intent to kill required for his convictions for attempted voluntary manslaughter of John Doe (count 2) and Jane Doe (count 3), "because no evidence established that appellant shot John Doe or Jane Doe, or even hit the car in which they fled." We have examined the record in the light most favorable to the judgment, keeping in mind that if the jury's findings are reasonably justified by the circumstances, we do not reverse the judgment because the circumstances also might reasonably be reconciled with a contrary finding. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278.) We conclude there was substantial evidence that Mason intended to kill John Doe and Jane Doe.

As the trial court instructed the jury, attempted voluntary manslaughter is a lesser included offense of attempted murder, as charged in counts 2 and 3. (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709.) While attempted murder requires malice aforethought, "[a] killing committed upon a sudden quarrel or heat of passion . . . may negate malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to attempted manslaughter." (*People v. Williams* (1988) 199 Cal.App.3d 469, 475.) Attempted voluntary manslaughter requires an intent to kill, and "the theory of transferred intent does not apply to attempts. . . . Thus, to prove defendant was guilty of . . . attempted voluntary manslaughter, the prosecution had to prove that defendant had the intent to kill" both John Doe, for a conviction on count 2, and Jane Doe, for a conviction on count 3. (*People v. Warner* (2019) 35 Cal.App.5th 25, 32

(*Warner*).) Intent to kill may be " ' "inferred from the defendant's acts and the circumstances of the crime." ' " (*Id.* at p. 37.)

Here, the evidence showed that Mason engaged with Jane Doe in the liquor store. Outside the store, Mason traded punches with John Doe, who was standing next to the white Civic, and then Mason drove off. John Doe and Jane Doe got into the Civic, with John Doe in the driver's seat. With tires squealing, Mason sped back to the liquor store, got out of the Town Car, and fired at least two and as many as four shots at the Civic, as John Doe drove away with Jane Doe in the front passenger seat.

Mason argues that his shots missed John Doe and Jane Doe, and missed the Civic altogether, and so he could not have intended to kill either one. The record does not support his argument. First, the record contains no evidence that all the shots missed the car or its occupants. The police never identified John Doe or Jane Doe, never located the Civic, and recovered only one bullet, although Mason fired two to four rounds. Second, even if there were evidence that the shots did not reach the car or its occupants, all the testimony was that Mason aimed at the Civic when he fired the gun. Missing the Civic (a moving target) and the two people inside is as likely to result from Mason's bad aim as from a lack of intent to kill. " ' "[T]he fact that the victim may have escaped death because of the shooter's poor marksmanship [does not] necessarily establish a less culpable state of mind." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

As for the attempted voluntary manslaughter of Jane Doe (count 3), Mason argues John Doe was the primary target, and insufficient evidence showed that he had the concurrent intent to kill Jane Doe as well. The trial court gave CALJIC No. 8.66.1: "A person who primarily intends to kill one person may also

concurrently intend to kill another person within a particular zone of risk. This zone of risk is termed the 'kill zone.' *The intent is concurrent when the nature and the scope of the attack while directed at a primary victim are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity.* [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' zone of risk is an issue to be decided by you." (Italics added.)

The italicized sentence of the instruction echoes *People v. Bland* (2002) 28 Cal.4th 313, 329 (*Bland*): " 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.' "

In *Bland*, the defendant fired shots into a car after a gang-related verbal exchange with the driver, and then he and another man fired "a flurry of bullets" at the car as it drove away. The driver was killed and the two passengers (who were not gang members) were wounded. It was not clear who fired the shots that hit the passengers. The jury found the defendant guilty of the driver's murder and the premeditated attempted murders of the two passengers. (*Bland*, *supra*, 28 Cal.4th at pp. 318, 331.) Our Supreme Court held: "[A] person who shoots at a group of people [may] be punished for the actions towards everyone in the group even if that person primarily targeted only one of them. . . . [T]he person might still be guilty of attempted murder of everyone in the group, although not on a transferred intent theory." (*Id.* at p. 329.) When the defendant acts to create a "kill zone" by attacking a group with enough force to kill everyone

in the group, although his primary target is one of the group members, he may be convicted of intending to kill persons other than the primary target. (*Id.* at p. 331.) "Even if the jury found that defendant primarily wanted to kill [the murder victim] rather than [his] passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers." (*Id.* at pp. 330-331.) The evidence need not establish that the defendant used enough force to *ensure* that everyone in the kill zone is killed; the question is whether "the circumstances of the shooting were such that defendant must be charged with knowing that anyone in the path of the lethal bullets could die, and knowing that others *were* in the path of the bullets." (*Warner*, *supra*, 35 Cal.App.5th at p. 39.)

The kill zone theory describes a reasonable inference a jury can draw when the evidence shows the defendant had a primary target when he fired a deadly weapon at a group of individuals, and also intended to kill everyone in the surrounding kill zone. (*People v. Medina* (2019) 33 Cal.App.5th 146, 154-155.) "Where there is no primary target, there is no concurrent intent and no basis for a kill zone instruction." (*Id.* at p. 156.)

Mason fired two to four shots at the two people inside the fleeing Civic. He attacked the group of two with sufficient force to kill both members of the group, and may be punished for his actions toward both. The evidence is strong that his primary target was John Doe. The jury could reasonably find he had a concurrent intent to kill Jane Doe, the other person in the surrounding kill zone (especially given his interaction with her

inside the liquor store and her intervention in the fight in the parking lot). Substantial evidence supports his convictions for the attempted voluntary manslaughter of John Doe and Jane Doe.

Mason lists cases applying the kill zone theory to find intent for a conviction of attempted murder, and argues those defendants used far more deadly force and with greater effect. Yet his citations disprove his point. In *People v. Tran* (2018) 20 Cal.App.5th 561, 564, the defendant drove the car from which another man shot at least five times at another car with eight people inside. In *People v. Garcia* (2012) 204 Cal.App.4th 542, 554, the defendant fired six to eight shots at four people. In *People v. Campos* (2007) 156 Cal.App.4th 1228, 1244, the defendant fired "nearly a dozen" bullets at a car with three people inside. In *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564, the defendants fired automatic weapons at two houses and were properly found guilty of 11 counts of attempted murder, although they could not see all the victims. Here, Mason fired two to four shots at a car with two people inside, after interacting with both John Doe and Jane Doe. The jury could conclude that Mason fired four times, which the jury could reasonably find is twice the deadly force necessary to kill two people, and could also conclude that Mason knew two people were in the bullets' path.

As for the effect of the shots, the instruction requires that the jury find the "nature and scope" of the attack sufficient to infer an intent to kill others than the primary victim, not that the *effect* of the attack justifies such an inference. And as we explained above, there was no evidence of the effect of Mason's multiple shots.

2. *The kill zone instruction was not erroneous*

Mason argues that an "outdated" version of CALJIC No. 8.66.1 given to the jury misstated the law to his prejudice and allowed the jury to convict him without finding that he had the specific intent to kill Jane Doe. CALJIC No. 8.66.1 was revised in Fall 2015, but the trial court gave the prior version when it instructed the jury in March 2017.[2]

"When the trial court's instruction is a correct statement of the law, defendant's failure to request an amplifying or clarifying instruction bars appellate review." (*Warner*, *supra*, 35 Cal.App.5th at p. 40.) Mason did not object to CALJIC

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[2] The revised instruction states: "A person who primarily intends to kill one person, or persons, known as the primary target[s], may at the same time attempt to kill [all] [people] [persons] in the immediate vicinity of the primary target[s]. This area is known as the 'kill zone.' A kill zone is created when a perpetrator specifically intending to kill the primary target by lethal means also attempts to kill [anyone] [everyone] in the immediate vicinity of the primary target[s]. If the perpetrator has this specific intent, and employs the means sufficient to kill the primary target[s] and all others in the kill zone, the perpetrator is guilty of the crime[s] of attempted murder of the [other person[s]] [anyone] in the kill zone. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ['kill zone'] [zone of risk] is an issue to be decided by you." The comment following the instruction notes the "fall 2015 revision [was] meant to more accurately track the holding in . . . *Bland*." Unlike the instruction given to the jury, the revised instruction expressly states that the perpetrator must have the specific intent to kill the primary target, and does not use the term "concurrent intent."

No. 8.66.1, request the revised version, or ask for clarification. " ' "The trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel." ' " (*Warner*, at p. 41.) Nevertheless, if the instruction as given is reversible error (as Mason argues), the defendant's substantial rights are affected, and we address the issue despite the lack of objection. (*People v. Felix* (2008) 160 Cal.App.4th 849, 857-858.)

We do not agree with Mason that CALJIC No. 8.66.1 (as given) affected his substantial rights. Mason argues the instruction's reference to a "zone of risk" suggested that he could be guilty of the voluntary manslaughter of Jane Doe if he merely placed her at risk of fatal injury, while attempted murder requires specific intent to kill. But the instruction told the jury it must decide "[w]hether [Mason] actually intended to kill the victim, *either as a primary target or as someone within a 'kill zone' zone of risk*." (Italics added.) In addition, our duty is to take the instructions as a whole, and we conclude that, reading the instructions together, it is not reasonably likely the jury was misled. (*People v. Tate* (2010) 49 Cal.4th 635, 696.) The court also instructed the jury that attempted murder as charged in counts 2 (John Doe) *and* 3 (Jane Doe) required the prosecution to prove that Mason had "a specific intent to kill unlawfully another human being," and that the lesser included offense of attempted voluntary manslaughter also required proof that Mason "had the specific intent to kill the other person."

Mason contends the instruction improperly defined the "kill zone" as "a particular zone of risk" containing people whom Mason also concurrently intended to kill. He argues that this would allow the jury to conclude the "zone of risk" included Jane

Doe in the passenger seat of the retreating Civic, and that only the driver's seat was properly encompassed by the instruction. We disagree. A finding that passenger Jane Doe sat within the kill zone of Mason's four shots at the car is not error, but a proper application of the law. Finally, Mason argues the instruction allowed the jury to find him guilty on count 3 if the jury concluded it was merely "reasonable" or "possible" to infer specific intent. As a whole, the instructions repeatedly told the jurors they must find that Mason actually had the specific intent to kill both John Doe and Jane Doe.

Mason argues the trial court should instead have instructed the jury with the instruction as revised in Fall 2015. We have concluded the instruction as given properly stated the law, and we do not express an opinion whether it would have been preferable to give the revised instruction. And even if error occurred, it was harmless given the strong evidence of Mason's specific intent to kill Jane Doe. Mason interacted with her in the liquor store, came outside and fought with John Doe while Jane Doe looked on and held John Doe, and then shot four times at the Civic where Jane Doe sat in the passenger seat.

This is not a case like *People v. McCloud* (2012) 211 Cal.App.4th 788. There, Division One of this district concluded it was error to give a kill zone instruction where defendants were charged with two counts of murder and 46 counts of attempted murder, and the evidence showed the defendants fired 10 shots at a crowded party, killing two victims. (*Id*. at pp. 790-791.) The court concluded that it was not possible the defendants "specifically intended to kill the 4.6 people per shot that would be necessary" for application of the kill zone theory to the 46 attempted murder counts, so there was insufficient evidence to

support the instruction. (*Id.* at p. 800.) The prosecutor did not argue there was a primary target, "so the argument presented no factual basis for application of the kill zone theory." (*Id*. at pp. 801-802.) The Court of Appeal also suggested that CALJIC No. 8.66.1 "should probably be revised." (*McCloud*, at p. 802, fn. 7.) By contrast, in this case substantial evidence showed that Mason, after interacting with Jane Doe and fighting with John Doe, shot four times at the Civic (two shots per person), with John Doe as the primary target and Jane Doe sitting next to him. This was a strong factual basis for the kill zone theory. Given the circumstances of the shooting, the jury could conclude Mason knew that anyone in the car was in the path of the bullets and could die, and that Jane Doe was in the path of the bullets. (See *Warner*, *supra*, 35 Cal.App.5th at pp. 39-40.)

3. People v. Canizales *does not require reversal.*

After we heard oral argument in this case, the California Supreme Court decided *People v. Canizales* (2019) 7 Cal.5th 591 (*Canizales*). The court held: "[T]he kill zone theory for establishing the specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken together, such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the

primary target and everyone within the zone of fatal harm. [¶] In determining the defendant's intent to create a zone of fatal harm and the scope of any such zone, the jury should consider the circumstances of the offense, such as the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the victims to the primary target." (*Id.* at p. 607.) The court concluded "the evidence concerning the circumstances of the attack (including the type and extent of force used by [the defendant shooter]) was not sufficient to support a reasonable inference that defendants intended to create a zone of fatal harm around a primary target." (*Id.* at p. 610.)

In *Canizales*, although substantial evidence allowed the inference that one of the victims was the primary target, the court concluded the evidence was insufficient to allow the jury to find that the defendants intended to create a zone of fatal harm around the primary target, and that the other victim was within that zone. (*Canizales*, *supra*, 7 Cal.5th at p. 611.) Although five shots were fired, the defendants were not "in close proximity to the area surrounding their intended target" but 100 to 160 feet away at a block party on a wide city street, and the bullets were " 'going everywhere' " as the victims ran after the first shot was fired. "This evidence was insufficient to support instruction on the kill zone theory." (*Ibid.*) The court reversed the conviction for attempted murder of the other victim. (*Id.* at p. 615.)

By contrast, here, the evidence showed that Mason fired a total of four shots while standing in close proximity to the car driven by his primary target (John Doe) with Jane Doe (with whom he had interacted inside and outside the liquor store) next to him in the front passenger seat, and Mason ran after the car

and continued to shoot as it drove away. These facts are closer to the facts in *Bland*, where the defendant started shooting into a vehicle and then fired at the car as it started to drive away. (*Canizales*, *supra*, 7 Cal.5th at p. 611.)

Canizales emphasizes that we must focus on the circumstances of the attack on the primary target to determine whether the evidence allowed the jury to infer the defendant's intent to create a zone of fatal harm. (*Canizales*, *supra*, 7 Cal.5th at p. 606.) Although "[s]uch a determination does not turn on the effectiveness or ineffectiveness of the defendant's chosen method of attack," the evidence in *Canizales* that neither victim of the attempted murder charges was hit by any of the shots fired "further diminishes any inference that defendants intended to create a zone of fatal harm." (*Id.* at p. 611.) As we already stated, in this case there is no evidence whether any of the shots fired by Mason hit John Doe, Jane Doe, or the car, and thus no evidence whether the attack was effective.

Canizales held that as there was insufficient evidence to support an instruction on the kill zone theory, the trial court's error in giving an instruction on that theory was prejudicial and required reversal. (*Canizales*, *supra*, 7 Cal.5th at p. 612.) The jury also had been instructed that it could convict the defendants for attempted murder of the other victim if it found they specifically intended to kill the other victim (without regard to the "kill zone" theory). (*Ibid.*) But the "kill zone" instruction given in *Canizales* (CALCRIM No. 600) did not tell the jury to consider the circumstances of the attack, and the prosecutor's closing argument gave an overbroad definition of the kill zone theory that would have amplified the potential for confusion. (*Canizales*, at p. 613.)

Here, sufficient evidence supported an instruction on the kill zone theory. In addition, the instruction in this case told the jury to consider "the nature and the scope of the attack" in deciding whether Mason intended to kill John Doe (as the primary victim) and Jane Doe (as someone within the kill zone). And in closing argument, the prosecutor properly emphasized that the jury should consider the nature and scope of the attack, in determining whether it was reasonable to infer that Mason intended to kill John Doe as the primary victim and Jane Doe as enveloped in the kill zone in the car.

Canizales ably clarifies the boundaries of the kill zone theory and sets out the requirements for sufficient evidence and adequate instructions. It does not require us to reverse Mason's conviction.

4. *The gang enhancements were not supported by substantial evidence*

The jury found true the section 186.22, subdivision (b)(1)(B) gang allegations on all counts, resulting in sentence enhancements of 15 years on count 1, five years on count 2, five years on count 3, four years on count 4, and four years on count 5 (the sentences on counts 1 and 5 were stayed under section 654). Mason argues that the true findings on the gang enhancements must be reversed because insufficient evidence proved the primary activities of the Grape Street Crips. We agree.

Section 186.22, subdivision (f), as in effect at the time of the shooting, defines a "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33),

inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity."

"To trigger the gang statute's sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang's primary activities is the commission of one or more of certain crimes listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) "[E]vidence of either past or present criminal acts listed in subdivision (e) of section 186.22 is admissible to establish the statutorily required primary activities of the alleged criminal street gang. Would such evidence alone be sufficient to prove the group's primary activities? Not necessarily. The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*Id.* at p. 323.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony . . . that the gang . . . was primarily engaged in . . . statutorily enumerated felonies." (*Id.* at p. 324.)

Detective Machuca testified that Mason was a tattooed member of Grape Street Crips, the largest Crips criminal street gang in Watts. He testified that two other Grape Street members were convicted of felon in possession of a firearm in 2015, and robbery in 2014. He also testified that the shooting at the Civic

would benefit the gang, and would benefit Mason by showing that he was "a gang member who is not afraid to put in work" by "engaging in criminal activity such as robberies, burglaries, shootings, stabbings, and so forth and selling narcotics."

That was all. Detective Machuca was never asked, and never testified, about the gang's primary activities. The only evidence of crimes specific to Grape Street Crips (other than the crimes charged against Mason) was that members of the gang committed two predicate offenses in 2014 and 2015. That evidence of occasional criminal activity over two years was not sufficient to prove the gang's *primary* activities. There was no testimony that felon in possession, robbery, or attempted murder were the gang's chief or principal activities. And there was no evidence that Grape Street Crips consistently and repeatedly committed those crimes. Detective Machuca listed criminal activities that might constitute "putting in work" for Mason, but the list was nonexclusive ("and so forth"), and he did not state which of the crimes were Grape Street's primary or principal criminal activities.

In *People v. Perez* (2004) 118 Cal.App.4th 151, 160, evidence of the gang's "retaliatory shootings of a few [three] individuals over a period of less than a week, together with a beating six years earlier, was insufficient to establish that 'the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.' " In *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611, the gang expert was asked about primary activities and testified that he "knew" the gang had committed a list of crimes, without stating which were the gang's primary activities. Not only did this testimony lack foundation, but even adding two predicate crimes

by gang members, the evidence was conclusory and insufficient because it did not prove that the gang members had engaged in the crimes consistently and repeatedly. (*Id.* at p. 614.) "Isolated criminal conduct . . . is not enough." (*Id.* at p. 611.)

By contrast, when the gang expert was asked about the gang's primary activities and responded that gang members "often" committed robberies, assaults with deadly weapons, and narcotics sales, that testimony in combination with the predicate offenses was sufficient evidence of primary activity to support the gang enhancement. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.) When the gang expert was asked about the gang's primary activities and responded with a list of specific crimes, the jury could infer the listed crimes were the gang's primary activities. (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 107.) When there was "evidence of consistent and repeated criminal activity during a short period of time" by a small gang that had existed for only two years, this was sufficient evidence of primary activities when combined with testimony about predicate offenses. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224-1226.) When the gang expert specifically testified about the gang's primary activities and established the foundation for his testimony, the evidence was sufficient. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330.)

Here, the gang expert was not asked about the gang's primary activities, and never testified about which criminal activities the gang principally committed. Insufficient evidence supported a necessary element of the gang enhancement. We

reverse the true findings on the criminal street gang allegation in counts 1-5, and strike the terms imposed on that basis.[3]

5. *The trial court retained the discretion to impose concurrent sentences on counts 2 and 3*

Mason argues that when the trial court sentenced Mason to consecutive terms for the convictions of attempted voluntary manslaughter on counts 2 (John Doe) and 3 (Jane Doe), the court was under the misapprehension that it did not have the discretion to impose concurrent sentences. Mason also argues that counsel's failure to object to the consecutive sentences on counts 2 and 3 was ineffective assistance of counsel.

The prosecution's sentencing memorandum argued that counts 2 and 3 were perpetrated on separate victims, requiring separate and consecutive sentences on those counts, and recommended a total sentence of 100 years to life. Mason's sentencing memorandum argued only that the recommended total sentence of 100 years to life punished Mason for going to trial after he refused the prosecution's pretrial offer of 40 years. The defense memorandum did not address whether consecutive sentences were mandatory.

At the sentencing hearing, the trial court stated it was inclined to follow the prosecution's recommendation of the maximum term allowed by law, although the court's determination was independent. The court reviewed the defense argument "that anything other than sentencing him to

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[3] Given our reversal of the true findings on the gang allegations, we do not address Mason's argument that section 186.22 did not authorize the imposition of a consecutive gang enhancement on count 1.

the 40-year offer would be . . . vindictive prosecution." After discussion of the effect of any plea offer made by the prosecution, and concluding "there weren't any firm offers," the court proceeded to sentence Mason, imposing consecutive terms on count 2 (50 years to life) and count 3 (40 years to life).[4]

Mason did not object to the consecutive sentences on counts 2 and 3 on the grounds he now advances on appeal. When the trial court makes a discretionary decision at sentencing, a defendant must object that the court did not "properly make or articulate its discretionary sentencing choices," or forfeit the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353, 356.) Mason argues he has not forfeited the issue, because the court was unaware of its discretion to impose concurrent sentences. When the trial court misunderstands the law and fails to exercise its discretion, that failure is reviewable in the absence of a timely objection, "when [the court's] misapprehension is affirmatively demonstrated by the record." (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1023, 1026.)

First, we address respondent's argument that the trial court did not have the discretion that Mason claims the court failed to know it possessed.

The Three Strikes law consists of two almost identical statutory schemes: section 667, enacted by the Legislature in 1994, and section 1170.12, enacted by ballot initiative the same year. (*People v. Frierson* (2017) 4 Cal.5th 225, 230.) In *People v. Hendrix* (1997) 16 Cal.4th 508, 511 (*Hendrix*), our Supreme Court considered whether under section 667, "imposition of consecutive

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[4] The court also ran the 10-year sentence on count 4 (possession of a firearm by a felon) consecutively.

sentences is not mandatory, but merely discretionary, when a defendant has suffered two or more prior felony convictions within the meaning of [section 667,] subdivision (d) and is convicted of multiple felony convictions based on a single act of violence against multiple victims." *Hendrix* concluded: "[Section 667, s]ubdivision (c)(6) mandates consecutive sentencing for *any* current felony convictions not committed on the same occasion, and not arising from the same set of operative facts. Consecutive sentencing is not mandated under subdivision (c)(6) if the current felonies are committed on the same occasion or arise from the same set of operative facts. However, under subdivision (c)(7), if any two current felonies are serious or violent, and were not committed on the same occasion, and do not arise from the same set of operative facts, the trial court must impose the sentences for these offenses consecutive to each other" as well as the defendant's sentence for any other conviction. (*Hendrix*, at pp. 513-514.)

Mason's two current felony convictions of voluntary manslaughter in counts 2 and 3, although violent and serious, were committed on the same occasion and arise from the same operative facts (his firing multiple shots at the Civic after the interaction with Jane Doe and the altercation with John Doe). "Therefore, [section 667,] subdivision (c)(7) does not mandate that the trial court impose consecutive sentences," and in the absence of another statute requiring consecutive sentencing, "the trial court therefore retained discretion to sentence defendant either concurrently or consecutively." (*Hendrix*, *supra*, 16 Cal.4th at p. 514; see *People v. Deloza* (1998) 18 Cal.4th 585, 591.) Section 667, subdivisions (b)-(j) was virtually identical to its corresponding provision in the legislative version of the

statute, section 1170.12. (*People v. Lawrence* (2000) 24 Cal.4th 219, 222, fn. 1.) Under the holding in *Hendrix*, the trial court had discretion to sentence Mason concurrently on counts 2 and 3.

Fifteen years after *Hendrix*, Proposition 36, enacted by the voters in November 2012, revised both statutes. (*People v. Valencia* (2017) 3 Cal.5th 347, 350.) Proposition 36 amended section 1170.12, subdivision (a)(7), which had been identical to section 667, subdivision (c)(7), by deleting the language in brackets below and adding the language in boldface: "If there is a current conviction for more than one serious or violent felony as described in [~~paragraph 6 of this~~] subdivision **(b)**, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." (See *People v. Torres* (2018) 23 Cal.App.5th 185, 200 (*Torres*).) Section 1170.12, subdivision (a)(6) was unchanged, and, like section 667, subdivision (c)(6), it states: "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section."

In *Torres*, *supra*, 23 Cal.App.5th 185, Division One of the First District concluded that after Proposition 36, the unchanged section 1170.12, subdivision (a)(6) "continues to apply to *any* current felony convictions (including serious and/or violent felonies) and requires consecutive sentencing when the felonies (including serious and/or violent felonies) were not committed on ' "the same occasion" ' or did not arise from ' "the same set of operative facts." ' (*Hendrix*, *supra,* 16 Cal.4th at p. 512.) The courts also retain discretion to impose concurrent sentences for

felonies (including serious and/or violent felonies) committed on the same occasion or arising from the same set of operative facts." (*Torres*, at pp. 200-201.) The change to section 1170.12, subdivision (a)(7), replacing the reference to "paragraph 6" with "subdivision (b)" (which defines serious and violent felonies) "changed the *triggering* language of the subdivision, and subdivision (a)(7) now applies not only when serious or violent felonies were not committed on the same occasion or did not arise from the same set of operative facts, but whenever a defendant is convicted of multiple serious or violent felonies. Proposition 36 made no change, however, to the *directive* portion of section 1170.12, subdivision (a)(7), which, as the Supreme Court explained in *Hendrix*, is what makes subdivision (a)(7) not duplicative of subdivision (a)(6). [Citation.] This portion of subdivision (a)(7), *additionally* requires a court to impose the sentences for serious and violent felonies 'consecutive to the sentence for *any other conviction* for which the defendant may be consecutively sentenced in the manner prescribed by law.' [Citations.] Accordingly, section 1170.12, subdivision (a)(7) now applies whenever there are multiple serious and/or violent felony convictions, whether or not they were not committed on the 'same occasion' or did not arise from the 'same set of operative facts.' And the sentences for those serious and/or violent felonies (imposed either consecutively or concurrently as required or allowed under section 1170.12, subd. (a)(6)), must 'run consecutive *to the sentence for any other offense, whether felony or misdemeanor, for which a consecutive sentence may be imposed.'* [Citation.]" (*Torres*, at p. 201.)

We agree with *Torres*'s reasoning and its conclusion: "In short, the change to section 1170.12, subdivision (a)(7) made

by Proposition 36 impacts only the additional requirement for consecutive sentencing of 'other' current offenses (namely, *non*serious and/or violent felonies and misdemeanor offenses). . . . [S]ubdivision[s] (a)(6) and (7) continue to 'show themselves to state two rules' in a Three Strikes case—'a general one, for all felonies "not committed on the same occasion, and not arising from the same set of operative facts" ' 'and a special one, for only "serious or violent felon[ies]" ' as defined by the Three Strikes law. (*Hendrix, supra*, 16 Cal.4th at p. 518 (conc. opn. of Mosk, J.); see §§ 667, subd. (c)(6), 1170.12, subd. (a)(6).) That 'special one' now requires that where there are multiple serious and/or violent felony convictions, the sentences for those crimes 'must run consecutive *to the sentence for <u>any other</u> offense, whether felony or misdemeanor, for which a consecutive sentence may be imposed*.' " (*Torres*, *supra*, 23 Cal.App.5th pp. 201-202, fn. omitted.)

The trial court retained the discretion it had under *Hendrix*, to impose concurrent sentences on counts 2 and 3. At the sentencing hearing, the court showed no awareness that it could sentence Mason to concurrent terms on counts 2 and 3, the prosecutor had represented that consecutive sentences were required, and defense counsel was silent. In any event, we have "discretion to resolve the claim in the interests of fairness and judicial economy, since the matter is already being remanded for other sentencing matters, and to forestall unnecessary ineffective assistance of counsel claims." (*People v. Leon*, *supra*, 243 Cal.App.4th at p. 1023.) We therefore direct that on remand, the trial court shall exercise its discretion whether to impose concurrent sentences on counts 2 and 3. (See *Torres*, *supra*, 23 Cal.App.5th at pp. 202-203 [detailing considerations on remand].)

6. *Mason was not punished for exercising his right to trial*

Before trial began, after conferring with the prosecutor and the court in chambers, defense counsel stated: "[W]e had informally with counsel discussed the possibility of disposition. I did make a determinant [*sic*] offer of 43 years based on charges under just count 2 and that has been declined." The minute order, however, states: "The People's offer of 43 years is rejected by the defendant."

After Mason's trial and the guilty verdicts, the prosecutor's sentencing memorandum argued a number of aggravating factors and no circumstances in mitigation, and recommended the maximum sentence of 100 years to life. The defense sentencing memorandum argued that a sentence of more than 40 years would punish Mason "for simply going to trial. His sentence will go from the prosecution's offer of 40-years to a 40-plus to a 100-year sentence." The memorandum argues that the only change was that Mason had exercised his Sixth Amendment right to trial, and the prosecution had presumably considered 40 years to be enough to punish Mason and protect society. Mason "should not receive any more than what he was offered before trial."

At Mason's sentencing hearing, the court stated it had read the probation report and the prosecution's sentencing memorandum. After reviewing the defense memorandum, the court described the defense position as "anything other than sentencing him to the 40-year offer would be . . . vindictive prosecution." The prosecutor stated he had reviewed the file, which "indicates that there was never any specific offer made." Defense counsel had asked for an offer, and "I spoke to the head deputy who indicated, well, he would have to agree to something

in the 40's. That was the conversation. . . . There was no specific offer. . . . [I]t didn't happen." The court stated that the circumstances showed that Mason had been unable to stay out of trouble since a juvenile offense in 1991, with his use of alcohol contributing to his criminal history.[5] The court had "on many occasions after a trial" imposed the same term as an appropriate offer, but it had also gone below and "way above an offer because there are facts that even the People don't know about that occur during a trial." The court also agreed that the prosecution had not made a firm offer. Defense counsel argued that Mason should not be punished for going to trial, and the prosecutor rejoined that this was a third strike case, so both counts 2 and 3 required 25 years to life even before the enhancements. The court imposed the 100-year sentence.

Punishing a defendant for exercising the right to jury trial violates due process, and a court " 'may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.' " (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279.) Nevertheless, any terms offered by the prosecution do not constrain the trial court's sentencing discretion, and Mason must make some showing that the court imposed a longer sentence to punish the defendant for exercising his right to jury trial. (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 762.) The mere fact that Mason received a more severe sentence after a jury verdict of guilty is not evidence that the sentence is vindictive. (*Ibid.*) The trial court may learn additional facts by observation during trial or in the presentence

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[5] Mason's probation report listed five factors in aggravation and no circumstances in mitigation.

report by the probation department to induce it to impose a longer sentence. (*Ibid.*)

The record is equivocal whether the prosecution even made a plea offer to Mason. But even assuming Mason did refuse an offer of around 40 years, nothing shows that the trial court's sentence was vindictive. In *In re Lewallen*, *supra*, 23 Cal.3d 274, the trial court commented that there was no use in having the prosecutor try to negotiate if, after trial, the defendant receives the same sentence he refused to accept before trial. (*Id.* at p. 277.) Here, there is no similar evidence of vindictive sentencing.

7. *On remand, the trial court must exercise its discretion under Senate Bill No. 620*

Mason argues, and we agree, that the trial court on remand must exercise its discretion whether to strike the firearm enhancements on counts 2 and 3.

The trial court imposed consecutive 10-year terms on counts 2 and 3 for use of a firearm in the commission of a felony. (§ 12022.5, subd. (a).) Mason argues that his case should be remanded to allow the trial court to exercise the discretion conferred under Senate Bill No. 620, effective January 1, 2018, to strike the firearm enhancements.

We agree with Mason that, as a defendant whose sentence is not yet final on appeal, he is entitled to the trial court's exercise of its discretion whether to strike the firearm enhancements, a discretion it did not possess when it sentenced him in July 2017. At sentencing, "the trial court gave no indication whether it would exercise discretion to strike the firearm enhancement . . . if it had such discretion." (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) Respondent

argues that the trial court chose the upper term of 10 years for each of the two enhancements, showing there is no possibility that on remand it would strike the enhancements. But "speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.)

We therefore direct the trial court on remand to decide in the first instance, at a hearing at which Mason has the right to be present with counsel, whether to exercise its discretion to strike the firearm enhancements. (*People v. Rocha* (2019) 32 Cal.App.5th 352, 359-360.)

8. *On remand, the trial court must exercise its discretion under Senate Bill No. 1393*

Mason argues, and we agree, that the trial court on remand must exercise its discretion whether to strike the prior serious felony enhancements.

When the trial court imposed two 5-year enhancements for Mason's prior serious felony convictions (two second degree robbery convictions in 1997, when Mason was 19), the court did not have discretion to strike or dismiss the enhancements under section 667. (See *People v. Jones* (1993) 12 Cal.App.4th 1106, 1116-1117.) Senate Bill No. 1393 (S.B. 1393) went into effect on January 1, 2019 (2017-2018 Reg. Sess.), amending section 667, subdivision (a), and section 1385, subdivision (b), to allow a court to exercise its discretion to strike or to dismiss a prior serious felony conviction enhancement for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) In supplemental briefing, respondent initially asserted the issue was not ripe, but conceded that if Mason's judgment was not final before January 1, 2019, the new law would apply to him retroactively. The law is now in effect,

and we accept respondent's concession. S.B. 1393 is "ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.)

Respondent opposes remand for resentencing, arguing that the trial court's statements at the sentencing hearing clearly show the court would not have exercised its discretion in Mason's favor. From the court's remarks at the hearing as described above, we cannot definitively say that the trial court would not exercise its discretion to strike the five-year enhancements. The trial court is in a better position to exercise its informed discretion when making sentencing decisions. "[A] court that is unaware of its discretionary authority cannot exercise its informed discretion." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We therefore direct the trial court on remand to decide in the first instance whether to exercise its discretion under S.B. 1393.

9. *Mason is entitled to additional days of presentence custody credit*

Mason argues, and respondent concedes, that he is entitled to three additional days of custody credit. Mason was arrested on January 18, 2016, and sentenced on July 11, 2017. He received credit for 539 days of actual custody and 80 days for good time/work time, for a total of 619 days of credit. He was actually entitled to 541 days of actual custody credit, and 81 days of conduct credit (calculated as 15 percent of 541). (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1184.) On remand, he must be awarded a total of 622 days of presentence custody credit.

DISPOSITION

The judgment is affirmed in part and reversed in part. The true findings on the criminal street gang allegations are reversed and the terms imposed on that basis are stricken. On resentencing, the trial court shall exercise its discretion whether to impose concurrent sentences on counts 2 and 3; whether to strike the firearm enhancements on counts 2 and 3; and whether to strike the two prior serious felony enhancements. The trial court shall also award 541 days of actual custody credit and 81 days of conduct credit for a total of 622 days of presentence custody credit. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.